



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Improving Consistency in Social Security Disability Adjudications

Committee on Adjudication

Proposed Recommendation | June 13-14, 2013

1 The Administrative Conference of the United States has undertaken many studies over
2 the years relating to the Social Security disability benefits system.¹ It has issued a number of
3 recommendations specifically directed at improving SSA’s initial application and appeals
4 processes,² as well as other recommendations more generally designed to improve agency
5 adjudicatory procedures.³ The Conference last issued a recommendation on the Social Security
6 disability benefits system over twenty years ago. The system has grown substantially since that

¹ The Social Security Act created two programs—Social Security Disability Insurance and Supplemental Security Income—to provide monetary benefits to persons with disabilities who satisfy these programs’ respective requirements. See 42 U.S.C. §§ 401(b), 1381 (2013).

² These recommendations include: Recommendation 91-3, *The Social Security Representative Payee Program*, 56 Fed. Reg. 33,847 (July 24, 1991); Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability*, 55 Fed. Reg. 1665 (Jan. 18, 1990 (as amended)); Recommendation 87-7, *A New Role of the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987) [hereinafter ACUS Recommendation 87-7]; and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

³ *E.g.*, Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989); Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986); Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973).

7 time. Approximately 3.3 million disability claims are now filed at the state level annually,⁴
8 which represents a 57% increase since 1990.⁵ In a program of this size, adjudicating disability
9 benefits claims in a fair, consistent, and timely manner is a monumental challenge.

10 Those cases flow through a nationwide, multi-step process, by which SSA determines
11 whether a claimant is disabled and eligible for benefits. State agencies make initial disability
12 determinations using federal guidelines. Claimants may file (and pursue) their own claims or
13 they may choose to enlist the assistance of a representative, who may or may not be a lawyer.
14 If benefits are denied, claimants may request reconsideration (in most states). If benefits are
15 denied after reconsideration, claimants may request a hearing before an Administrative Law
16 Judge (ALJ). ALJs adjudicate nearly 800,000 cases a year.⁶ In FY 2011, about 56% of disability
17 benefits claims were allowed at the ALJ hearing stage,⁷ though more recent figures show a
18 decline in this rate.⁸ ALJ hearings, which may be in-person or by video conferencing, are
19 conducted using a de novo standard of review, and generally follow the Administrative
20 Procedure Act's adjudication procedures. Although ALJs preside at the hearings,
21 decisionwriters typically write decisions for ALJs based on instructions from them. Usually,
22 decisionwriters are not assigned to specific ALJs, but serve instead as part of a "pool" in each
23 hearing office from which writing assignments for decisions are made.

24 Appeals Council review is the final step in the administrative process. The Appeals
25 Council is comprised of about 125 Administrative Appeals Judges and Appeals Officers, and has
26 discretionary authority to grant, deny, or dismiss a claimant's request for review, as well as

⁴ SOC. SEC. ADMIN., ANNUAL PERFORMANCE PLAN FOR FY 2013 AND REVISED PERFORMANCE PLAN FOR FY 2012, at 11 (2012).

⁵ SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 6 tbls. 1a & 1b (Feb. 2012).

⁶ *Id.* at 13.

⁷ HAROLD KRENT & SCOTT MORRIS, STATISTICAL APPENDIX: ANALYSIS OF ADMINISTRATIVE LAW JUDGE DISPOSITION AND FAVORABLE RATES IN FISCAL YEARS 2009 TO 2011 13, 14 tbl. A-8 (2013) [hereinafter STATISTICAL APPENDIX].

⁸ HAROLD KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 8 (2013) (noting a 50% allowance rate in FY 2012).

27 remand the case back to an ALJ or issue a decision.⁹ In FY 2012, the Appeals Council processed
28 over 166,000 requests for review, a 30.7% increase from FY 2011.¹⁰ In addition to processing
29 requests for review, the Appeals Council has authority to identify cases for review on its “own
30 motion” through use of “random or selective sampling” techniques.¹¹ Currently, however, the
31 Appeals Council only reviews a national random sample of ALJ decisions as a quality assurance
32 mechanism; the Appeals Council has not exercised its selective sampling authority in recent
33 years.¹² In FY 2012, the Appeals Council completed random review of 7,074 such decisions.¹³
34 The Appeals Council publishes its decisions only rarely, in the form of Appeals Council
35 Interpretations (ACIs), and its decisions sometimes serve as the basis for Social Security Rulings.
36 Claimants who disagree with the final administrative decision may seek judicial review in
37 federal court.

38 Adjudicators and other agency employees at both the ALJ hearing level and Appeals
39 Council level use electronic case management systems to help manage their workflow and to

⁹ The Conference believes that its 1987 conclusion, that a “principal mandate” of the Appeals Council is “to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process” remains valid today. *See* ACUS Recommendation 87-7, *supra* note 2.

¹⁰ Soc. Sec. Admin., Office of Appellate Operations, Executive Director’s Broadcast, at 1 (Oct. 19, 2012) [hereinafter Exec. Dir. Broadcast]. Of these 166,000 requests for review, the Appeals Council dismissed or denied 78.3% of the requests, remanded 18.6% of the cases back to ALJs, and issued decisions (*i.e.*, fully favorable, partially favorable, or unfavorable) in 2.6% of the cases. *Id.* at 2.

¹¹ 20 C.F.R. §§ 404.969, 416.1469 (2013) (detailing the Appeals Council’s “own motion” review authority and procedures). The Social Security Act grants broad authority to the Commissioner to establish hearing procedures and, on his or her own motion, hold hearings or conduct other proceedings as necessary for the proper administration of the program. *See, e.g.*, 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2013).

¹² This recommendation suggests that, to enhance decisional accuracy and consistency, SSA expand the Appeals Council’s use of “own motion” review of unappealed ALJ decisions through selective sampling based on announced, neutral, and objective criteria that identify problematic issues, fact patterns, or case characteristics. Under this recommendation, focused review might be warranted, for example, based on: the subject matter of a claim, the manner in which a hearing was held, or statistical analyses showing a high likelihood of error or significantly anomalous outcomes.

¹³ Exec. Dir. Broadcast, *supra* note 10, at 3. The Appeals Council agreed with the decisions of ALJs 82.5% of the time, and either remanded or issued corrective decisions approximately 16% of the time. At the end of the FY 2012, there were 741 “own motion” review cases still pending final action. *Id.*

40 provide case-related management information. The current system in use at the hearing level
41 is the Case Processing Management System (CPMS), while the Appeals Council level uses the
42 Appeals Council Review Processing System (ARPS). Not only do adjudicators and other staff use
43 CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to
44 identify and address trends and anomalies existing at the various levels of agency adjudication.
45 While SSA has endeavored to build effective data reporting systems, limitations still exist that
46 relate to data capture and linking the various systems.

47 Not only does SSA process an extraordinary number of claims through a national, multi-
48 tiered system, but, in doing so, the agency tries to ensure that decisionmaking is consistent and
49 accurate at all levels of adjudication, and that legally sufficient decisions are issued that can
50 withstand review by federal courts. Consistency and accuracy, however, have suffered under
51 the strain of administering such a sprawling program. To be sure, an ALJ faces an enormous
52 task in adjudicating hundreds of cases annually.¹⁴ Nonetheless, divergent allowance rates
53 among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate,
54 manner.¹⁵ The Appeals Council similarly struggles to fulfill its error-correction and quality-
55 review roles. That these steps may have room for improvement is evidenced by the 45% rate at
56 which cases are remanded back to the agency from federal courts in recent years.¹⁶ Bringing
57 greater consistency and accuracy to the disability claims adjudication process will enhance the
58 fairness and integrity of the program.

¹⁴ On average, for FY 2009 – FY 2011, ALJs issued 538.9 dispositions per year. See STATISTICAL APPENDIX, *supra* note 7, at 6, 8 tbl. A-2.

¹⁵ In recent years, while the distribution of yearly allowance disposition rates has been approximately normal (*i.e.*, a mean of 56%), the distribution covers a wide range of allowance rates, with 95% of the rates falling between 26% and 85%. See STATISTICAL APPENDIX, *supra* note 7, at 13, 14 fig. A-8 (analyzing allowance rates for FY 2009 – FY 2011). The lowest allowance rate was 4% and the highest allowance rate was 98%. *Id.*

¹⁶ STATISTICAL APPENDIX, *supra* note 7, at 54 tbl. A-24. Policy compliance among ALJs has improved in recent years. See Michael J. Astrue, former Comm’r, Soc. Sec. Admin., Address at the Social Security Advisory Board Forum: Straight Talk about “Disability Reform.” (Mar. 8, 2013), *available at* <http://www.ssab.gov/Portals/0/2013Forum/Presentations/Astrue%20Speech%203-8-13.pdf>.

59 One area of particular concern—due to its apparent contribution to a high remand
60 rate—is SSA’s treating source rule, which generally affords “controlling weight” to the opinions
61 of a claimant’s treating physician, psychologist, or other acceptable medical source.¹⁷ In the
62 early 1990s, SSA sought to bring greater clarity and uniformity to the assessment of medical
63 evidence by establishing regulatory standards for such evaluations. In practice, however, this
64 evidentiary rule has not delivered on its promise of improving consistency. In recent years,
65 erroneous application of the treating source rule has been cited as the basis for remand by the
66 Appeals Council at a 10% frequency rate, and the frequency rate with which it is cited by
67 federal courts is even higher at 35%.¹⁸ Dramatic changes in the American health care system
68 over the past twenty years also call into question the ongoing efficacy of the special deference
69 afforded to the opinions of treating sources. Individuals typically visit multiple medical
70 professionals in a variety of settings for their health care needs and less frequently develop a
71 sustained relationship with one physician.¹⁹ Moreover, difficulty in determining who among a
72 wide range of medical professionals should be considered a treating source has bedeviled ALJs
73 and reviewing courts, contributing to high remand rates.²⁰

74 This recommendation finds its genesis in SSA’s request that the Conference study the
75 role of the Appeals Council in reviewing cases to reduce any observed variances among
76 adjudicative decisions at the hearing level, as well as the efficacy of SSA’s treating source rule.
77 These studies also revealed other areas that appear ripe for recommendation. While SSA has
78 enacted various initiatives to increase consistency and has issued rulings to clarify its
79 regulations, the size and complexity of the system leave more work to be done. The following
80 recommendations reaffirm certain portions of past recommendations that remain valid and

¹⁷ See 20 C.F.R. §§ 404.1527(c), 416.927(c) (2012).

¹⁸ See OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE, Appendix B, at A-4, A-8 (2013).

¹⁹ See *id.* at 25-33.

²⁰ See *id.* at 23-24, 33-35.

81 relevant and also identify new approaches to ensure consistency, accuracy, and fairness across
82 this massive decision system.

Recommendation

83 ALJ Hearing Stage

84 1. *Improving Adjudication Effectiveness and Consistency.* In order to promote
85 greater decisional consistency, and streamline the adjudication process at the ALJ hearing
86 stage, SSA should consider:

87 (a) requiring claimant representatives (while also permitting claimants without
88 representation) to submit pre-hearing briefs in a standardized format that, among other
89 things, summarizes the medical evidence and justification for the claimant's eligibility
90 for benefits;

91 (b) expanding the use of video hearings in a manner consistent with sound
92 technological practices, because such hearings promote efficiency and do not lead to a
93 significant difference in allowance rates from in-person hearings. SSA should continue
94 to advise claimants that opting for video hearings often results in faster scheduling of
95 hearings (as compared to in-person hearings) and more convenient hearing locations;
96 and

97 (c) exploring the assignment of decisionwriters and case technicians to specific ALJs
98 in a hearing office (with Hearing Office Directors continuing to supervise such support
99 staff), while maintaining flexibility for changes in technological and operational needs.

100 Appeals Council

101 2. *Balancing Error-Correction and Systemic Review Functions.* SSA should continue
102 to promote the consistent application of policy to the adjudication of disability benefits claims
103 across a nationwide program. SSA should ensure that the Appeals Council strikes an

104 appropriate balance between its error-correction function when exercising discretionary review
105 of individual claimants' requests for review, and its mandate to improve organizational
106 effectiveness, decisional consistency, and communication of agency policy through use of "own
107 motion" review and other types of systemic quality assurance measures.

108 3. *Enhancing Communication.* SSA should make clear that an essential function of
109 the Appeals Council is both to focus on consistent application of Social Security regulations and
110 policies on a systemic basis, and to disseminate advice and guidance to SSA policymakers, ALJs,
111 and other lower-level decisionmakers. The Appeals Council should advise and assist
112 policymakers and ALJs by:

113 (a) issuing Appeals Council Interpretations (ACIs), with greater frequency, in order
114 to: address policy gaps; promote greater consistency and uniformity throughout the
115 adjudicatory process; and, establish precedents upon which claimants and their
116 representatives may rely. Such ACIs should be circulated within the agency and made
117 publicly available through posting on SSA's website or other similar means of public
118 dissemination;

119 (b) considering the publication of selected ALJ or Appeals Council decisions to serve
120 as model decisions (*e.g.*, they are well-reasoned and clear), or to provide needed policy
121 clarifications. Consistent with statutory obligations to maintain the privacy of sensitive
122 information, such publications should not include personally identifiable information;

123 (c) continuing, to the greatest extent feasible, to send cases that have been
124 remanded from the Appeals Council or federal courts back to the same ALJs who initially
125 adjudicated such claims for additional proceedings as required. If an ALJ who initially
126 decided a claim will not be presiding over a case post-remand, SSA should nonetheless
127 ensure that he or she still receives notification of the remand decision. Decisionwriters
128 who were involved in drafting a remanded decision should also receive notification of
129 remand decisions; and

130 (d) developing a program for ALJs to serve extended voluntary details on the
131 Appeals Council in order to introduce a measure of peer review, enrich ALJ
132 understanding of the appeals process, and benefit the Appeals Council by introducing
133 the perspectives and insights of ALJs. In support of that effort, SSA should seek a waiver
134 from the Office of Personnel Management (OPM) of its durational (120-day) limit on
135 details, which, if granted, would enable detailed ALJs to gain a deeper knowledge of the
136 Appeals Council than is possible under a shorter detail period. OPM should give
137 favorable consideration to such a request.

138 4. *Expanding Focused "Own Motion" Review.* In order to focus attention on the
139 unappealed decisions that most warrant review, thereby enhancing both accuracy and
140 consistency, SSA should expand the Appeals Council's use of its "own motion" review by using
141 selective review in a manner consistent with ALJ decisional independence. The Appeals Council
142 should use announced, neutral, and objective criteria, including statistical assessments, to
143 identify problematic issues or fact patterns that increase the likelihood of error and, thereby,
144 warrant focused review. In addition, SSA should review unappealed decisions that raise issues
145 whose resolution likely would provide guidance to ALJs and adjudicators. In expanding its "own
146 motion" review, SSA must ensure that (i) selection-of-review criteria are developed in a neutral
147 fashion without targeting particular ALJs or other decisionmakers, and that (ii) inclusion of
148 cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary,
149 SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand
150 the Appeals Council's use of selective sampling to identify for review decisions that:

151 (a) raise issues for which resolution by the Appeals Council would provide policy
152 clarifications to agency adjudicators or the public;

153 (b) appear, based on statistical or predictive analysis of case characteristics, to have
154 a likelihood of error or lack of policy compliance; or

155 (c) otherwise raise challenging issues of fact or law, or have case characteristics,
156 that increase the likelihood of error.

157 **Use of Opinion Evidence from Medical Professionals (Treating Source Rule)**

158 5. *Evaluating Medical Source Opinions.* SSA should revise its regulations to
159 eliminate the controlling weight aspect of the treating source rule in favor of a more flexible
160 approach based on specific regulatory factors. SSA should give ALJs greater discretion and
161 flexibility when determining the appropriate weight to afford opinions from treating sources
162 (which may or may not be determinative), consistent with the factors enumerated in the
163 current regulatory scheme for evaluation of opinions of acceptable medical sources who are
164 not deemed “treating” sources. Such factors should include: (i) length of the treatment
165 relationship and frequency of examination; (ii) nature and extent of the treatment relationship;
166 (iii) supportability of the medical source’s opinion; (iv) consistency of the medical source’s
167 opinion; (v) specialization of the medical source; and (vi) any other factors that may support or
168 contradict a medical source’s opinion. In all cases, ALJs should articulate the bases for the
169 weight given to opinions from medical sources.

170 6. *Recognizing the Value of Other Medical Sources.* SSA’s existing regulatory
171 scheme, which assigns second-tier evidentiary value to the opinions of nurse practitioners
172 (NPs), physician assistants (PAs), and licensed clinical social workers (LCSWs) professionals
173 because they are not considered “acceptable medical sources,” should be reconsidered to
174 reflect the realities of the current health care system. For many Social Security disability
175 claimants, these medical professionals are the de facto “treating source” of medical care for
176 physical and mental illnesses. SSA should consider:

177 (a) revising its regulations to add NPs, PAs, and LCSWs as “acceptable medical
178 sources,” consistent with their respective state-law based licensure and scopes of
179 practice; or

180 (b) issuing a new Social Security ruling or other interpretive policy statement that
181 makes clear, for agency adjudicators, federal courts, and the public, the value of, as well
182 as the weight to be afforded, the opinions of these three types of medical professionals.

183 **Statistical Quality Assurance Measures**

184 7. *Enhancing Data Reporting Systems.* SSA should consider enhancing its current
185 data reporting systems in order to enable a more robust statistical quality assurance program.
186 To enhance its current data reporting systems, such as the Case Processing Management
187 System (CPMS) and the Appeals Council Review Processing System (ARPS), or any respective
188 follow-on systems, SSA should consider how to associate types of cases and issues, regions,
189 hearing offices, adjudicators, procedural elements and benchmarks, and decisional outcomes
190 together. The goal of such systems should not only be objective evaluation of the agency's case
191 processing operation, but also the effective utilization of data to inform policy formation and
192 operational consistency.

193 8. *Capturing Additional Data.* SSA should specifically consider addressing the
194 limitations of CPMS, ARPS, and any respective follow-on systems by ensuring that these data
195 reporting systems capture (as appropriate):

- 196 (a) information related to any prior hearings;
- 197 (b) whether a decision involved a hearing or on-the-record decision;
- 198 (c) whether new evidence was submitted by a claimant after his or her hearing to
199 the ALJ or to the Appeals Council; and
- 200 (d) data or other tracking mechanisms enabling ARPS and CPMS data to be related
201 to a single claim through all case processing stages, including hearings, Appeals Council
202 review, and remand by the Appeals Council or federal courts.

203 9. *Encouraging Employee Feedback.* SSA should encourage feedback from SSA
204 employees to identify other types of case-related data that should be captured, or suggest ways
205 to facilitate the linking of SSA's multiple data reporting systems in order to improve overall data
206 quality and quality assurance capabilities.